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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 PAUL J. BECK, et al.,

11 Plaintiffs,

12 v.

13 U.S. BANK NATIONAL
ASSOCIATION, et al.,

14 Defendants.

CASE NO. C17-0882JLR

ORDER ON MOTION TO
DISMISS

15
16 **I. INTRODUCTION**

17 Before the court is Defendants U.S. Bank National Association (“U.S. Bank”) and
18 Nationstar Mortgage LLC’s (“Nationstar”) (collectively, “Defendants”) motion to
19 dismiss Plaintiffs Paul J. Beck and Lin O. Beck’s (collectively, “Plaintiffs”) complaint
20 for failure to state a claim. (MTD (Dkt. # 10).) The court has considered the parties’
21 submissions in support of and in opposition to the motion, the relevant portions of the

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1 record, and the applicable law. Being fully advised,¹ the court GRANTS Defendants'
2 motion.

3 II. BACKGROUND

4 On August 17, 2005, Plaintiffs purchased a property at 817 North Gales Street,
5 Port Angeles, Washington, using a \$122,250.00 loan from lender Guaranty Bank.
6 (Compl. (Dkt. # 1) ¶ 11, Ex. 1 at 1-3.)² Guaranty Bank secured the loan with a deed of
7 trust, which was recorded in Clallam County. (*Id.* ¶ 13, Ex. 1.) The deed lists Plaintiffs
8 as the borrowers, Guaranty Bank as the lender, Defendant Mortgage Electronic
9 Registration System, Inc. ("MERS")³ as the beneficiary of the deed "solely as a nominee
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11 ¹ Although both parties request oral argument, the court concludes that oral argument will
12 not be helpful to its disposition of the motion and denies the parties' request. *See* Local Rules
W.D. Wash. LCR 7(b)(4).

13 ² Generally, a district court may not consider material beyond the complaint in ruling on a
Rule 12(b)(6) motion to dismiss. *Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001).
14 However, a court may consider material properly submitted as part of the complaint, and a court
may take judicial notice of matters of public record. *Id.* Thus, the court cites to the complaint's
15 exhibits and accepts them as true for purposes of this motion because the exhibits are properly
submitted with the complaint and because those exhibits that have been recorded are matters of
16 public record. *See id.* The court is "not . . . required to accept as true allegations that contradict
exhibits attached to the [c]omplaint or matters properly subject to judicial notice"
17 *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010).

18 ³ As explained by the Washington Supreme Court:

19 In the 1990s, [MERS] was established by several large players in the mortgage
industry. MERS and its allied corporations maintain a private electronic
20 registration system for tracking ownership of mortgage-related debt. This system
allows its users to avoid the cost and inconvenience of the traditional public
21 recording system and has facilitated a robust secondary market in mortgage backed
debt and securities. Its customers include lenders, debt servicers, and financial
institutes that trade in mortgage debt and mortgage backed securities, among others.

22 *Bain*, 285 P.3d at 36

1 for [l]ender and [l]ender's successors and assigns," and First American Title Insurance
2 Company ("First Title") as the trustee. (*Id.* Ex. 1 at 1-2.) The deed also notified
3 Plaintiffs that the promissory note it secured could be sold without giving them prior
4 notice. (*Id.* at 12.)

5 Six years later, on November 10, 2011, MERS executed and recorded an
6 Assignment of Deed of Trust assigning "all beneficial interest in" the deed of trust to
7 U.S. Bank, as trustee for the LXS 2006-2N securitized trust investors, "together with the
8 note(s) and obligations therein described." (Compl. ¶ 14, Ex. 2 at 1.) Plaintiffs
9 acknowledge that this was the "first assignment" of the deed of trust. (Resp. (Dkt. # 22)
10 at 8.) Almost two years later, on November 4, 2013, former Defendant Bank of America,
11 N.A. ("BANA") recorded an assignment using identical language and assigned the note
12 and deed to Nationstar. (*Id.* at 3-4.) However, BANA subsequently recorded a
13 Corrective Assignment of Deed of Trust on January 4, 2016, to clarify that it had
14 recorded the 2013 assignment in error and that the 2011 beneficiary, U.S. Bank—rather
15 than Nationstar—remained the beneficiary on the deed. (*See id.* at 3-6.)

16 On February 23, 2016, U.S. Bank recorded an Appointment of Successor Trustee
17 that named Quality Loan Service Corporation ("QLSC") as the new trustee for the deed.
18 (Compl. ¶ 18, Ex. 4 ("Trustee Appointment") at 2.) As of March 6, 2017, Plaintiffs were
19 in arrears on their loan for \$66,971.33, and QLSC initiated a non-judicial foreclosure
20 action that day by recording a Notice of Trustee's Sale for Plaintiffs' property, scheduled
21 for July 14, 2017. (*See id.* ¶ 37, Ex. 5 ("Not. of Sale") at 1, 4.)

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1 On June 8, 2017, Plaintiffs filed the instant action. (*See generally id.*) Three
2 months later, the court granted a stipulated motion dismissing MERS and BANA as
3 defendants. (9/12/17 Order (Dkt. # 16).) Accordingly, U.S. Bank and Nationstar are the
4 only remaining defendants.

5 Plaintiffs seek equitable and monetary relief under federal and state law. (*See*
6 *generally* Compl.) They seek declaratory and injunctive relief under two theories. (*Id.*
7 ¶¶ 60, 66.) First, Plaintiffs allege that Defendants violated Washington’s Deed of Trust
8 Act (“DTA”), RCW 61.24.030, by “fail[ing] to properly record all assignments of the
9 [d]eed of [t]rust” before they initiated foreclosure proceedings. (*Id.* ¶ 60.) Second,
10 Plaintiffs allege that the securitized trust managed by U.S. Bank was an invalid assignee
11 because the 2011 assignment violated the trust’s pooling and service agreement (“PSA”)
12 and provisions of the internal revenue code, 26 U.S.C. §§ 860F, 860G. (*Id.* ¶¶ 62-66.)

13 Plaintiffs also seek damages under four different claims. (*Id.* ¶¶ 67-93.) First,
14 Plaintiffs seek damages under a theory of unjust enrichment. (*Id.* ¶¶ 67-70.) Second,
15 Plaintiffs claim Defendants violated Washington’s Consumer Lending Act (“CLA”),
16 RCW 31.04.027, and the state’s Collection Agency Act (“CAA”), RCW ch. 19.16. (*Id.*
17 ¶ 74.) Third, Plaintiffs claim Defendants violated Washington’s Consumer Protection
18 Act (“CPA”), RCW ch. 19.86. (*Id.* ¶¶ 75-85.) Fourth, Plaintiffs claim Defendants
19 violated the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692. (*Id.*
20 ¶¶ 74, 86-93.)

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III. ANALYSIS

A. Legal Standards

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court construes the complaint in the light most favorable to the nonmoving party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must accept all well-pleaded allegations of material fact as true and draw all reasonable inferences in favor of the plaintiff. *See Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678.

The court, however, need not accept as true a legal conclusion presented as a factual allegation. *Id.* Although Federal Rule of Civil Procedure 8 does not require “detailed factual allegations,” it demands more than “an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* (citing *Twombly*, 550 U.S. at 555). A pleading that offers only “labels and conclusions or a formulaic recitation of the elements of a cause of action” will not survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Id.* Further, a pleading may fail to state a claim under Rule 12(b)(6) “either by lacking a cognizable legal theory or by lacking sufficient facts alleged

1 under a cognizable legal theory.” *Woods v. U.S. Bank N.A.*, 831 F.3d 1159, 1162 (9th
2 Cir. 2016). Thus, a complaint must contain sufficient factual allegations to “plausibly
3 suggest entitlement to relief, such that it is not unfair to require the opposing party to be
4 subjected to the expense of discovery and continued litigation.” *Starr v. Baca*, 652 F.3d
5 1202, 1216 (9th Cir. 2011).

6 **B. Washington’s Deed of Trust Act**

7 The DTA, RCW ch. 61.24, governs statutory deeds of trust in Washington and
8 establishes the procedures required for non-judicial foreclosure. *See Massey v. BAC*
9 *Home Loans Servicing LP*, No. C12-1314JLR, 2012 WL 5295146, at *1 (W.D. Wash.
10 Oct. 26, 2012). Under the DTA, a deed of trust is a form of three-party mortgage,
11 involving not only a lender and a borrower, but also a neutral third-party called a trustee.
12 *See Buse v. First Am. Title Ins. Co.*, No. C08-0510MJP, 2009 WL 1543994, at *1 (W.D.
13 Wash. May 29, 2009). The trustee holds an interest in the title to the borrower’s property
14 on behalf of the lender, who is also called the beneficiary. *Id.* Should the borrower
15 default on his loan, the beneficiary need not petition a court to initiate foreclosure
16 proceedings but may instruct the trustee to conduct a non-judicial foreclosure. RCW
17 §§ 61.24.010(2), .020, .030. The beneficiary may replace the trustee with a successor
18 trustee to initiate the foreclosure. RCW 61.24.010(2).

19 Traditionally, the beneficiary of a deed of trust was “the lender who has loaned
20 money to the homeowner.” *Bain v. Metro. Mortg. Grp., Inc.*, 285 P.3d 34, 36 (Wash.
21 2012). But lenders “have long been free to sell that secured debt, typically by selling the
22 promissory note signed by the homeowner,” and so the DTA defines “beneficiary” more

1 broadly as “the holder of the instrument or document evidencing the obligations secured
2 by the deed of trust.” *Id.* (quoting RCW § 61.24.005(2)). In *Bain*, the Washington
3 Supreme Court interpreted the DTA’s definition of “beneficiary” and held that a DTA
4 beneficiary must be the “holder of the promissory note.” *Id.* at 36, 43. Thus, MERS
5 could not lawfully foreclose because MERS was not the holder of the note, even though
6 the deed of trust listed MERS as the “beneficiary” and MERS was purportedly “the
7 holder of the deed of trust.” *Id.* at 42-44.

8 “Holder” status, and thus DTA beneficiary status, turns on possession of the note,
9 not ownership. In other words, a “holder” does not need to own the note to be the DTA
10 beneficiary. *Brown v. Wash. State Dep’t of Commerce*, 359 P.3d 771, 784 (Wash. 2015).
11 Although the initial lender is both the owner of the note (the party with the beneficial
12 interest who is entitled to the payments on the note and/or the proceeds of a foreclosure
13 sale) and the holder of the note (the statutory beneficiary entitled to enforce the note,
14 foreclose, and negotiate modifications), those rights are often separated when the lender
15 sells the note on the secondary market. *See Marts v. U.S. Bank Nat’l Ass’n*, 166 F. Supp.
16 3d 1204, 1209 (W.D. Wash. 2016); *Brown*, 359 P.3d at 779. As the note is transferred
17 between different holders, the DTA contemplates that the security instrument, such as a
18 mortgage or deed of trust, will follow the note. *Bain*, 285 P.3d at 44.

19 In *Brown*, the Washington Supreme Court held that a loan servicer was the DTA
20 beneficiary because it was the holder of the note, even though Freddie Mac owned the
21 beneficial interest. 359 P.3d at 784. In concluding that the loan servicer was the holder
22 of the note, the *Brown* court looked to the definition of “holder” in Washington’s

1 Uniform Commercial Code: the “person in possession of a negotiable instrument that is
2 payable either to bearer or to an identified person that is the person in possession.” *Id.* at
3 778 (quoting RCW 62A.1-201(21)(A)). The court noted that the definition of holder
4 focuses on possession of the note rather than ownership “in order to protect the borrower
5 from being sued fraudulently or by multiple parties on the same note.” *Id.* at 778-79.

6 **C. Plaintiffs’ Claims**

7 1. Declaratory Relief Invalidating Foreclosure Due to Improper Chain of Title 8 and Securitization

9 Plaintiffs assert two claims for declaratory relief. They assert that the court should
10 declare the sale of their property in foreclosure invalid due to an improper chain of title
11 and the securitization of their loan. (*See* Compl. ¶¶ 49-66.) Plaintiffs’ claims for
12 declaratory relief invalidating the foreclosure sale fail for several reasons.

13 First, Plaintiffs rest their claim on the notion that separating the deed of trust and
14 the note renders the note unenforceable. (Compl. ¶ 45 (“It can be argued that if the Deed
15 of Trust and Note are not together with the same entity, then there can be NO
16 enforcement of the Note.”).) Plaintiffs’ argument is contrary to Washington law because,
17 as explained above, the DTA “contemplates that the security instrument will follow the
18 note, not the other way around.” *Bain*, 285 P.3d at 44; *see also Bavand v. OneWest Bank*,
19 385 P.3d 233, 248 (Wash. Ct. App. 2016), *as modified* (Dec. 15, 2016) (“By operation of
20 law, [the borrower’s] deed of trust followed the negotiation of that note now held by [the
21 foreclosing party]. Accordingly, [the foreclosing party] had the ability to enforce the
22 deed of trust due to its possession of the note.”). Based on these authorities, it follows

1 logically that the noteholder is entitled to enforce both the note and the DOT by operation
2 of law. *See Bavand*, 385 P.3d at 248-49 (“[The bank’s] authority to enforce the note and
3 [DOT] arose by operation of law due to the bank’s status as holder of the delinquent
4 note.”). Thus, “it is not a violation in Washington to split the note from the deed.”
5 *Zamzow v. Homeward Residential, Inc.*, No. C12-5755 BHS, 2012 WL 6615931, at *1
6 (W.D. Wash. Dec. 19, 2012) (citing *Bain*, 285 P.3d at 48-49). Thus, any contention in
7 the complaint that foreclosure is improper because the note and deed of trust are “split”
8 fails as a matter of law. *See Robinson v. Wells Fargo Bank Nat’l Ass’n*,
9 No. C17-006JLR, 2017 WL 2311662, at *4 (W.D. Wash. May 25, 2017).

10 Second, Plaintiffs allege that MERS was never a valid beneficiary of the deed of
11 trust, and thus MERS’ assignment of the deed of trust to U.S. Bank on November 10,
12 2011, was improper. (*See* Compl. ¶ 54; Resp. at 16.) However, “the noteholder is
13 entitled to enforce both the note and the [deed of trust] by operation of law.” *Robinson*,
14 2017 WL 2311662, at *4. In other words, the power to initiate foreclosure lies with the
15 holder of the promissory note “regardless of any assignment of the deed of trust.” *Blake*
16 *v. U.S. Bank Nat’l Ass’n*, No. C12-2186MJP, 2013 WL 6199213, at *2 (W.D. Wash.
17 Nov. 27, 2013); *see, e.g., Ukpoma v. U.S. Bank Nat’l Ass’n*, No. 12-CV-0184-TOR, 2013
18 WL 1934172, at *3 (E.D. Wash. May 9, 2013) (“[B]y virtue of being in possession of the
19 note. . . , [U.S. Bank’s] right to receive payment on the note does not depend upon any
20 assignment of the note.”); *Massey*, 2013 WL 6825309, at *6 (“Bank of America’s
21 authority to foreclose on the loan stemmed from the fact that Bank of America held the

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1 Note,” and therefore plaintiff’s “argument that the Assignment [of the deed of trust] is
2 ‘without effect and a nullity’ . . . is beside the point.”).

3 Third, Plaintiffs argue that Defendants violated the DTA, RCW 61.24.030(5), by
4 failing to record every assignment of the deed of trust. (Compl. ¶¶ 49-60; Resp. at
5 16-17.) The DTA requires that “the deed must have been recorded in the county in which
6 the property is located” prior to initiating a trustee’s sale. *Brown*, 359 P.3d at 775 (citing
7 RCW 61.24.030(5)). The DTA does not require recordation of every assignment of a
8 deed of trust. As the court stated in *Vawter v. Quality Loan Service Corporation of*
9 *Washington*:

10 The DTA states that “[i]t shall be requisite to a trustee’s sale . . . [t]hat the
11 deed of trust has been recorded in each county in which the land or some part
12 thereof is situated.” RCW 61.24.030(5). Nevertheless, the court is unable to
13 find any statutory requirement that all assignments of the Deed of Trust must
also be similarly recorded, and . . . the court is unable to find any authority
that requires the recording of assignments as a “requisite” to the institution
of a trustee’s sale.

14 No. C09-1585JLR, 2010 WL 5394893, at *5 (W.D. Wash. Dec. 23, 2010). Indeed, the
15 purpose of recording an assignment is to put parties who subsequently purchase an
16 interest in the property on notice regarding which entity owns a debt secured by the
17 property. *See* RCW 65.08.070. Such assignments do not affect the rights of a borrower.
18 *See In re United Home Loans*, 71 B.R. 885, 891 (W.D. Wash. 1987) (“An assignment of
19 a deed of trust and note is valid between the parties whether or not the assignment is
20 ever recorded.”). Here, there is no dispute that the deed of trust was recorded. (*See*
21 Compl. Ex. 1.) Thus, the requirement of RCW 61.24.030(5) was satisfied irrespective of
22 the recording or lack of recording thereafter of any subsequent assignment of the deed of

1 trust. *See also McPherson v. Homeward Residential*, No. C12-5920BHS, 2014 WL
2 442378, at *5 (W.D. Wash. Feb. 4, 2014); *Wright v. JPMorgan Chase Bank, N.A.*,
3 No. 4:16-CV-5155-EFS, 2017 WL 3623768, at *2 (E.D. Wash. Mar. 1, 2017)
4 (concluding that the DTA does not include a requirement to record every mortgage
5 assignment or transfer).

6 Fourth, Plaintiffs argue that the securitization of their loan invalidates the sale of
7 their property in foreclosure. This contention lacks merit because “the authority to
8 foreclose on a defaulting loan remains with the noteholder when a loan is securitized.”
9 *Blake*, 2013 WL 6199213, at *3. Numerous Washington courts have rejected the
10 contention that the securitization of a note voids the borrower’s debt obligations. *See*
11 *Pearse v. First Horizon Home Loan Corp.*, No. C16-5627BHS. 2016 WL 5933518, at *7
12 (W.D. Wash. Oct. 12, 2016) (collecting federal and state cases). Here, Plaintiffs allege
13 that U.S. Bank’s interest in the deed of trust is void because the transfer of Plaintiffs’ loan
14 into the securitized investment trust occurred after the closing date for the trust to be
15 funded under the PSA. (*See* Compl. ¶¶ 40-41, 63-66.) Other district courts within the
16 Ninth Circuit have already rejected this particular iteration of the securitization argument:

17 Plaintiffs fail to state a claim . . . based on an allegation that the assignment
18 is invalid as being made to a “closed” securitization trust in violation of the
19 PSA. This argument has been rejected . . . either (1) because a third party
lacks standing to raise a violation of a PSA, or (2) because noncompliance
with terms of a PSA is irrelevant to the validity of the assignment (or both).

20 *Au v. Republic State Mortg. Co.*, 948 F. Supp. 2d 1086, 1098 (D. Haw. 2013) (quoting
21 *Abubo v. Bank of New York Mellon*, No. CIV. 11-00312 JMS, 2011 WL 6011787, at *8
22 (D. Haw. Nov. 30, 2011)); *see also Deutsche Bank Nat. Tr. Co. v. Slotke*, 367 P.3d 600,

1 606 (Wash. Ct. App. 2016) (“[The plaintiff] bases this argument on a challenge to [the
2 bank’s] compliance with the trust’s [PSA], but she lacks standing to raise that issue
3 because she is not a party to or intended third-party beneficiary of that agreement.”)
4 (*citing In re Nordeen*, 495 B.R. 468, 480 (9th Cir. 2013) (explaining that the
5 securitization of a loan merely creates a separate contract distinct from the plaintiff's debt
6 obligations under the note)). The court sees no reason to depart from the foregoing
7 authority here.

8 Finally, Plaintiffs’ claims for declaratory relief fail because they lack standing to
9 challenge the assignments. *Zhong v. Quality Loan Service Corp. of Wash.*, No.
10 C13-0814JLR, 2013 WL 5530583, at *3 (W.D. Wash. Oct. 7, 2013) (“Ms. Zhong, as a
11 borrower and third party to the transactions, lacks standing to challenge the Assignment
12 and the Appointment.”). “[T]here is ample authority that borrowers, as third parties to
13 the assignment of their mortgage (and securitization process), cannot mount a challenge
14 to the chain of assignments unless a borrower has a genuine claim that they are at risk of
15 paying the same debt twice if the assignment stands.” *Borowski v. BNC Mortg., Inc.*, No.
16 C12-5867 RJB, 2013 WL 4522253, at *5 (W.D. Wash. Aug. 27, 2013); *see Lake v.*
17 *MTGLQ Investors, LP*, No. C17-0495JLR, 2017 WL 383950, at *6 (W.D. Wash. Sept. 1,
18 2017) (“[The plaintiff] lacks standing to challenge the assignment of his deed of trust
19 because he has not alleged that he is at a genuine risk of paying the same debt twice.”).
20 Plaintiffs assert no such allegation here. (*See generally* Compl.) Further, Plaintiffs fail to
21 raise any legally cognizable argument in response to Defendants’ argument that they lack
22 of standing to challenge the assignments of their deed of trust. (*See generally* Resp.)

1 Thus, for all of the reasons stated above, the court grants Defendants’ motion to dismiss
2 Plaintiffs’ claims for declaratory judgement invalidating the sale of their property in
3 foreclosure based on an improper chain of title or the securitization of their debt.

4 2. Unjust Enrichment

5 Plaintiffs allege that Defendants have been unjustly enriched by their receipt of
6 Plaintiffs’ loan payments and will be further unjustly enriched by the proceeds of an
7 “invalid and improper” trustee’s sale. (Compl. ¶¶ 69-70.) Plaintiffs’ allegation that U.S.
8 Bank has no interest in the deed of trust underlies this claim. However, as discussed
9 above, with respect to Plaintiffs’ claims for a declaratory judgment, this allegation is
10 without legal or factual support. *See supra* § III.C.1.

11 In any event, Plaintiffs’ claim for unjust enrichment cannot survive here.
12 “Washington courts preclude unjust enrichment claims premised on transactions
13 concerning which the parties entered into express contracts.” *Craig Wireless Sys. Ltd. v.*
14 *Clearwire Legacy LLC*, No. C10-1269Z, 2011 WL 4011415, at *12 (W.D. Wash. Sept. 9,
15 2011); *see also MacDonald v. Hayner*, 715 P.2d 519, 522 (Wash. Ct. App. 1986) (“A
16 party to a valid express contract is bound by the provisions of that contract, and may not
17 disregard the same and bring an action on an implied contract relating to the same matter,
18 in contravention of the express contract.”); *Mattos v. Laurus Funding Grp., Inc.*, No.
19 CIV. 11-00275 LEK, 2013 WL 253483, at *6 (D. Haw. Jan. 23, 2013) (“Plaintiff’s
20 allegations relate to the Note and Mortgage, which were express agreements that she
21 executed in connection with the loan, and Plaintiff therefore cannot maintain an unjust

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1 enrichment claim.”). Accordingly, the court grants Defendants’ motion to dismiss this
2 claim with prejudice.⁴

3 3. CLA Claim

4 Plaintiffs allege that Defendants violated the CLA through fraud and
5 misrepresentation premised on a laundry list of alleged wrongdoing involving the
6 assignments and securitization of the deed of trust. (*See* Compl. ¶¶ 71-74.) Plaintiffs
7 also allege a per se violation of the CLA based on Plaintiffs’ allegation that Defendants
8 violated the CAA. (*See id.*)

9 Defendants move to dismiss Plaintiffs’ CLA claim because it is based on fraud
10 and inadequately pled under Federal Rule of Civil Procedure 9(b). (MTD at 12.) “In
11 alleging fraud . . . , a party must state with particularity the circumstances constituting
12 fraud.” Fed. R. Civ. P. 9(b); *see also Haberman v. Wash. Pub. Power Supply Sys.*, 744
13 P.2d 1032, 1069 (Wash. 1987), *amended*, 750 P.2d 254 (Wash. 1988) (“The complaining
14 party must plead both the elements and circumstances of fraudulent conduct.”). Further,
15 the Ninth Circuit has stated that “Rule 9(b) does not allow a complaint to merely lump
16 multiple defendants together but ‘require[s] plaintiffs to differentiate their allegations
17 when suing more than one defendant . . . and inform each defendant separately of the
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19 ⁴ Plaintiffs’ response to the motion to dismiss includes new allegations purporting to
20 support a claim for breach of the contractual duty of good faith and fair dealing. (*See* Resp. at
21 20.) The court is not permitted to consider new allegations made outside of the complaint itself
22 in response to a Rule 12(b)(6) motion. *See Schneider v. Cal. Dep’t of Corr.*, 151 F.3d 1194,
1197 n.1 (9th Cir. 1998) (“In determining the propriety of a Rule 12(b)(6) dismissal, a court may
not look beyond the complaint to a plaintiff’s moving papers, such as a memorandum in
opposition to a defendant’s motion to dismiss.”). Thus, the court disregards any allegations
which attempt to assert new claims in Plaintiffs’ response.

1 | allegations surrounding his alleged participation in the fraud.” *Swartz v. KPMG LLP*,
2 | 476 F.3d 756, 764-65 (9th Cir. 2007) (quoting *Haskin v. R.J. Reynolds Tobacco Co.*, 995
3 | F. Supp. 1437, 1439 (M.D. Fla. 1998) (alterations in original)). Defendants argue that
4 | Plaintiffs’ conclusory allegations concerning Defendants’ alleged fraudulent conduct fails
5 | to meet this standard. The court agrees.

6 | At the outset, the CLA expressly “does not apply to . . . [a]ny person doing
7 | business under, and as permitted by, any law of this state or of the United States relating
8 | to banks, . . . [or] trust companies” RCW 31.04.025(2)(a). Thus, the statute does
9 | not apply to U.S. Bank.

10 | In addition, Defendants move to dismiss Plaintiffs’ claim of a per se violation of
11 | the CLA based on Defendants’ alleged violation of the CAA. (MTD at 13.) Indeed,
12 | Washington courts have concluded that the CAA is not applicable to foreclosure activity.
13 | *See Barbanti v. Quality Loan Serv. Corp.*, No. CV-06-0065-EFS, 2007 WL 26775, at *2
14 | (E.D. Wash. Jan. 3, 2007) (“[T]he Court finds the CAA is not applicable to the instant
15 | facts because [the defendant loan servicer] was acting to enforce a security interest [on
16 | real estate] and not to collect a ‘debt’.”). Further, banks and mortgage banks are
17 | expressly excluded from the CAA, and accordingly the statute is inapplicable to
18 | Defendants. *See* RCW 19.16.100(5)(c) (“‘Collection agency’ does not mean and does
19 | not include . . . [a]ny person whose collection activities are carried on in his, her, or its
20 | true name and are confined and are directly related to the operation of a business other
21 | than that of a collection agency, such as but not limited to . . . mortgage banks . . . and
22 | banks.”); *Johnson v. JP Morgan Chase Bank N.A.*, No. 14-5607 RJB, 2015 WL 4743918,

1 at *10 (W.D. Wash. Aug. 11, 2015) (“[The CAA] claim should be dismissed against
2 Chase because the statute expressly excludes “mortgage banks and banks” from its
3 coverage.”).

4 Finally, Defendants move to dismiss Plaintiffs’ CLA claim as barred by the
5 three-year statute of limitations applicable to claims based on fraud. (MTD at 14 (citing
6 RCW 4.16.080(4)).) “The statute begins to run in fraud cases when there is discovery by
7 the aggrieved party of the facts constituting the fraud. . . . Actual knowledge of the fraud
8 will be inferred if the aggrieved party, by the exercise of due diligence, could have
9 discovered it.” *Strong v. Clark*, 352 P.2d 183, 184 (Wash. 1960) (citing RCW
10 4.16.080(4)). Defendants argue that Plaintiffs’ CLA claim arose when Defendants
11 continue to collect Plaintiffs’ payments after the alleged failure of the November 2011
12 assignment of the deed of trust to investment trust. (See MTD at 14 (citing Compl. ¶¶ 63-
13 65, 93).) Defendants argue that Plaintiffs could have discovered the November 2011
14 assignment as a matter of public record since it was recorded at that time, and Plaintiffs
15 obviously knew that loan payments continued to accrue, but they nevertheless waited
16 until 2016 to bring their CLA claim. (*Id.*; see also Compl. Ex. 2). Plaintiffs provide no
17 meaningful response to Defendants’ statute of limitations argument. (See generally
18 Resp.) Indeed, Plaintiffs do not reference the CLA statute of limitations in their
19 response. (See *id.*) When a party fails to respond to a motion, the court may consider
20 such failure “as an admission that the motion has merit.” See Local Rules W.D. Wash.
21 LCR 7(b)(2).

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1 For all of the reasons stated above, the court grants Defendants' motion to dismiss
2 Plaintiffs' CLA claim with prejudice.

3 4. CPA Claim

4 Defendants also move to dismiss Plaintiffs' CPA claim. (MTD at 14-16.) Where
5 Plaintiffs' CPA claim rests on alleged underlying violations of the CLA, CAA, and DTA,
6 Plaintiffs' CPA claim fails as a matter of law for the reasons stated above. *See supra*
7 §§ III.C.1-3. Plaintiffs, however, also rely on allegations that Defendants "historically
8 engaged and presently engage in unfair or deceptive business practices," that the
9 involvement of MERS in the real estate transaction violates the CPA, and that MERS'
10 purported failed assignment to U.S. Bank resulted in "improperly executed documents"
11 and an improper nonjudicial sale procedure. (*See* Compl. ¶¶ 80-81, 83-85.)

12 To state a CPA claim, Plaintiffs must allege an actionable injury and a causal link
13 between the alleged misrepresentation or deceptive practice and the purported injury.
14 *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins.*, 719 P.2d 531, 539 (Wash.
15 1986) ("A causal link is required between the unfair or deceptive acts and the injury
16 suffered by plaintiff."). Plaintiffs allege damages, including "distraction and loss of time
17 . . . due to the necessity of addressing the wrongful conduct through this and other
18 actions, as well as having to incur costs charged by Defendants and to defend [their]
19 Property during these unlawful foreclosure proceedings, including incurring the costs of
20 hiring attorneys to represent [their] interests as homeowner[s]." (Compl. ¶ 85.)

21 Defendants assert that Plaintiffs have not alleged how the presence of MERS in the deed

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1 of trust or MERS' involvement with their loan in general has caused their alleged
2 injuries. (MTD at 16.) The court agrees.

3 Washington courts have determined that “an injury resulting from having to bring
4 suit to protect against [a] [l]ender’s foreclosure action . . . is insufficient to satisfy the
5 injury element of a private CPA claim.” *Demopolis v. Galvin*, 786 P.2d 804, 809 (Wash.
6 Ct. App. 1990). Further, “[a]ny damage to plaintiff’s credit, cloud on his title, or
7 monetary effect of the threat of foreclosure cannot be laid at MERS’ door.” *Babrauskas*
8 *v. Paramount Equity Mortg.*, No. C13-0494RSL, 2013 WL 5743903, at *4 (W.D. Wash.
9 Oct. 23, 2013). “*Bain* makes clear that the mere listing of MERS as a beneficiary is not
10 an actionable injury under the CPA, and Plaintiff has failed to allege any prejudice
11 resulting from MERS’ role.” *Cagle v. Abacus Mortg., Inc.*, No. 2:13-CV-02157-RSM,
12 2014 WL 4402136, at *4 (W.D. Wash. Sept. 5, 2014). Indeed, “[c]ourts have been
13 uniform in dismissing complaints that rest on bare allegations that MERS’ participation
14 tainted subsequent assignments and foreclosure actions.” (*Id.* (citing cases); *see also*
15 *Zalac v. CTX Mortg. Corp.*, 628 F. App’x 522, 523 (9th Cir. 2016) (“[A]lthough MERS
16 was named as the initial beneficiary in the deed of trust, it had no connection to the
17 foreclosure proceedings and can thus play no role in the causation of any of [the
18 plaintiff’s] purported damages.”) Here, Plaintiffs have not alleged facts raising a
19 plausible inference that, but for MERS’ involvement with their deed of trust or the
20 alleged improper assignments thereof, Plaintiffs would not have suffered the adverse
21 impacts of which they complain. Rather, Plaintiffs’ failure to meet their debt obligations
22 is the “but for” cause of the default, the foreclosure sale of their property, and the loss of

1 time and costs they incurred in having “to defend [their] property” and “hir[e] attorneys
2 to represent [their] interests as homeowner[s].” (*See* Compl. ¶ 85); *see also* *Zalac*, 628 F.
3 App’x at 523 (“In the end, [the plaintiff’s] CPA claim . . . fails because he has not
4 articulated how he has been injured as a result of any defendant's representations to
5 him.”))

6 Further, the securitization of Plaintiffs’ loan also does not constitute an actionable
7 unfair or deceptive act under the CPA. *See Cagle*, 2014 WL 4402136, at *4. The
8 transfer of Plaintiffs’ deed of trust and note did not extinguish Plaintiffs’ obligations
9 under those instruments because “even if [the transfer] did occur in violation of the PSA,
10 . . . the PSA contract was entirely separate from that giving rise to [Plaintiffs’]
11 obligations.” *Id.* The court concurs with Defendants, and Plaintiffs offer no meaningful
12 or substantive response to these arguments. Accordingly, the court grants Defendants’
13 motion to dismiss Plaintiffs’ CPA claim with prejudice.

14 5. FDCPA Claims

15 Plaintiffs allege violations of two provisions of the FDCPA, 15 U.S.C. §§ 1692e,
16 1692f(6). (Compl. ¶¶ 74, 86-93.) Section 1692e prohibits “[a] debt collector [from]
17 us[ing] any false, deceptive, or misleading representation or means in connection with the
18 collection of any debt.” 15 U.S.C. § 1692e. In relevant part, Section 1692f prohibits “[a]
19 debt collector [from] . . . [t]aking or threatening to take any nonjudicial action to effect
20 dispossession or disablement of property if . . . (B) there is no present intention to take
21 possession of the property” 15 U.S.C. § 1692f(6). Defendants argue that Plaintiffs’
22 claims under the FDCPA should be dismissed because the statute is inapplicable both to

1 the foreclosure activities at issue here and to Defendants, who are not statutory “debt
2 collectors.” (MTD at 17-18.) The court agrees.⁵

3 To state a claim under the FDCPA, a plaintiff must allege facts supporting three
4 threshold elements: (1) that the plaintiff is a “consumer” within the meaning of 15
5 U.S.C. § 1692a(3); (2) that the defendant is a “debt collector” within the meaning of 15
6 U.S.C. § 1692a(6); and (3) that the defendant “committed some act or omission in
7 violation of the FDCPA,” 15 U.S.C. §§ 1692a-1692o. *See Robinson v. Managed*
8 *Accounts Receivables Corp.*, 654 F. Supp. 2d 1051, 1057 (C.D. Cal. 2009) (citing
9 *Withers v. Eveland*, 988 F. Supp. 942, 945 (E.D. Va. 1997) and 15 U.S.C. § 1692a(3),
10 (6)); *see also Ananiev v. Aurora Loan Servs., LLC*, No. C 12-2275 SI, 2012 WL 2838689,
11 at *3 (N.D. Cal. July 10, 2012).

12 For purposes of a claim based on 15 U.S.C. § 1692e, the FDCPA defines a “debt
13 collector” as “any person who . . . [engages] in any business the principal purpose of
14 which is the collection of any debts, or who regularly collects or attempts to collect,
15 directly or indirectly, debts owed or due or asserted to be owed or due another”
16 *Dowers v. Nationstar Mortg., LLC*, 852 F.3d 964, 969 (9th Cir. 2017) (citing 15 U.S.C.
17 § 1692a(6)). Defendants argue that they do not fall within this statutory definition. The
18 court agrees. In *Henson v. Santander Consumer USA, Inc.*, the Supreme Court stated:

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20 ⁵ Plaintiffs offered no meaningful response to Defendants’ motion to dismiss their
21 FDCPA claims. (*See generally* Resp.) As noted above, when a party fails to respond to a
22 motion, the court may consider such failure “as an admission that the motion has merit.” *See*
Local Rules W.D. Wash. LCR 7(b)(2). The court construes Plaintiffs’ failure to provide any
meaningful response as an admission that the Defendants’ arguments have merit.

1 [T]he [FDCPA] defines debt collectors to include those who regularly seek
2 to collect debts “owed . . . another.” And by its plain terms this language
3 seems to focus our attention on third party collection agents working for a
4 debt owner—not on a debt owner seeking to collect debts for itself. Neither
5 does this language appear to suggest that we should care how a debt owner
6 came to be a debt owner—whether the owner originated the debt or came by
it only through a later purchase. All that matters is whether the target of the
lawsuit regularly seeks to collect debts for its own account or does so for
“another.” And given that, it would seem a debt purchaser like [the
defendant] may indeed collect debts for its own account without triggering
the statutory definition

7 *Henson v. Santander Consumer USA Inc.*, --- U.S. ---, 137 S. Ct. 1718, 1721-22 (2017)
8 (quoting 15 U.S.C. § 1692a(6)). Thus, Plaintiffs’ Section 1692e claim fails as a matter of
9 law because U.S. Bank does not fall within the statutory definition of a “debt collector”
10 when it attempts to collect a debt that it owns.⁶ Further, the Ninth Circuit’s decision in
11 *Ho v. ReconTrust Co., NA*, forecloses Plaintiffs’ assertion that Defendants violated 15
12 U.S.C. § 1692e by attempting to nonjudicially foreclose on Plaintiffs’ property. 858 F.3d
13 568, 572 (9th Cir. 2016) (“[A]ctions taken to facilitate a non-judicial foreclosure, such as
14 sending the notice of default and notice of sale, are not attempts to collect ‘debt’ as that
15 term is defined by the FDCPA.”).

16 Although Section 1692f(6) of the FDCPA does “regulate[] nonjudicial foreclosure
17 activity,” *see Dowers*, 852 F.3d at 970 (citing 15 U.S.C. § 1692f), Plaintiffs’ claim under
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19 ⁶ Although Plaintiffs allege that U.S. Bank does not own the loan, such allegations are
20 implausible because they are contradicted on the face of the documents attached to Plaintiffs’
21 complaint. (*See* Compl. Ex. 2); *see supra* § III.C.1; *see Daniels-Hall*, 629 F.3d at 998 (“We are
22 not . . . required to accept as true allegations that contradict exhibits attached to the
complaint”); *Somers v. Apple, Inc.*, 729 F.3d 953, 964-65 (9th Cir. 2013) (affirming
dismissal for failure to state a claim because the plaintiff’s theory was implausible in the face of
contradictory facts alleged in her complaint).

1 this provision also misses the mark. Section 1692f(6) prohibits the “[t]aking or
2 threatening to take any nonjudicial action to effect dispossession or disablement of
3 property if . . . there is no present right to possession of the property claimed as collateral
4 through an enforceable security interest.” 15 U.S.C. § 1692f(6)(A); *see Ho*, 840 F.3d at
5 622. Here, Plaintiffs fail to plausibly allege that U.S. Bank has “no present right to
6 possession of the property.” *See* 15 U.S.C. § 1692f(6)(A). Plaintiffs’ allegations to that
7 effect are premised on the notion that the assignments at issue here were ineffective and
8 deprived U.S. Bank of the right to foreclose on the property. (*See, e.g.,* Compl. ¶¶ 33,
9 36.) The court has already rejected this argument. *See supra* § III.C.1. Further,
10 Plaintiffs’ allegations are implausible because they are contradicted by the documents
11 attached to the complaint. (*See* Compl. Exs. 1-2.) Those documents, on their face,
12 demonstrate that U.S. Bank has a present right to possession of the property at issue as
13 collateral through an enforceable security interest. (*See id.*) Consequently, the court
14 cannot reasonably infer U.S. Bank’s foreclosure actions to be within the provisions of
15 Section 1692f(6), *see Daniels-Hall*, 629 F.3d at 998 (stating that the court is “not
16 required to accept as true allegations that contradict exhibits attached”), and dismisses
17 Plaintiffs’ FDCPA claims on this basis.

18 IV. CONCLUSION

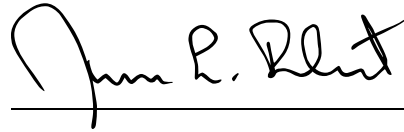
19 Based on the foregoing analysis, the court GRANTS Defendants’ motion to
20 dismiss (Dkt. # 10). Because the court concludes that the defects in the complaint cannot

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1 be cured by amendment, Plaintiffs' complaint is DISMISSED WITH PREJUDICE and
2 without leave to amend.

3 Dated this 14th day of December, 2017.

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6 JAMES L. ROBART
7 United States District Judge
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